**NO. 42330-8-II**

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARIO ELLIOT FALSETTA, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 09-1-00170-9

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# Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the court properly entered written findings of fact and conclusions of law pursuant to criminal rules 3.5 and 3.6, and whether the defendant is not prejudiced by the timing of their where they simply memorialize the court's oral findings and conclusions.

2. Whether the court properly denied defendant's motion to suppress evidence where Kowalchuck's entry into and subsequent search of defendant's residence were lawful where the entry was based on lawful consent and the search on reasonable cause to believe the defendant had violated a condition of community custody.

3. Whether defendant's convictions of second degree identity theft and second degree possessing stolen property should be affirmed where, when viewed in the light most favorable to the state, there is sufficient evidence from which a rational trier of fact could have found beyond a reasonable doubt the disputed elements of intent with respect to the identity theft counts and knowledge with respect to the possessing stolen property counts.

B. STATEMENT OF THE CASE.

1. Procedure

On January 9, 2009, Mario Elliot Falsetta, hereinafter referred to as the "defendant," was charged by information with second degree identity theft in count I, second degree possessing stolen property in counts II and III, and unlawful use of drug paraphernalia in count IV. CP 1-2.

The State filed an amended information on April 20, 2010, in which it added an additional count of second-degree identity theft as count V. CP 4-6.

On March 23, 2011, the State filed a second amended information, which eliminated count IV, unlawful use of drug paraphernalia. CP 48-49. *See* 03/22/11 RP 7-9; 03/23/11 RP 47[1].

On February 17, 2011, the court heard motions pursuant to Criminal Rule (CrR) 3.5 and 3.6, at which Deputy William Ruder, 02/17/2011 RP 8-18, and Community Corrections Officer Ryan Kowalchuck testified. 02/17/2011 RP 20-78.

Kowalchuck testified that he went to the address the defendant listed with the Department of Corrections (DOC) as his residence to conduct a "home visit," that is, to make sure that the defendant was actually residing at the address he gave DOC. CP 115-17 (undisputed fact 1); 02/17/2011 RP 23-28, 39-40. Kowalchuck was invited into the residence by Defendant's girlfriend, and found an ammunition box sitting on a table in the front room. 02/17/2011 RP 26-29. The defendant stated that he found the box outside, but Kowalchuck did not find this answer

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[1] Citations to the Verbatim Report of Proceedings found herein are in the same format employed in Appellant's brief: [Date of Proceeding] RP [Page Number].

credible because it was the middle of February and the box did not appear weathered. 02/17/2011 RP 45-46. Given that the defendant was not, under the conditions of his community custody, allowed to possess ammunition, Kowalchuck felt the defendant may be in violation of those conditions, and searched Defendant's bedroom for ammunition or firearms. 02/17/2011 RP 29-30, 45-46; CP 11-21.

The defendant argued that Kowalchuck's entry into the house was unlawful because he did not give ***Ferrier*** warnings to the defendant's girlfriend. 02/17/2011 RP 65-69; CP 7-8. *See* ***State v. Ferrier***, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998). The State countered that there was no search until Kowalchuck saw the ammunition box because Kowalchuck was lawfully inside the house to approve the defendant's "[t]he residence location and living arrangements." 02/17/2011 RP 69-71,CP 11-21.

The court found that Kowalchuck was invited into Defendant's residence by Defendant's girlfriend, and that when Kowalchuck discovered the ammunition box, he gained reasonable suspicion to search Defendant's bedroom for ammunition and firearms. CP 115-17; 02/17/2011 RP 73-76. The court therefore denied Defendant's motion to suppress. CP 115-17; 02/17/2011 RP 73-76.

On March 17, 2011, the case was called for trial. 03/17/11 RP 1. The parties argued motions in limine, 03/21/11 RP 1-15, 23-36, 03/22/11 RP 7-8, and discussed the court's prior CrR 3.5 ruling. 03/17/11 RP 15-23.

The parties then selected a jury on March 21, 2011. 03/21/11 RP 36-37, 03/22/11 RP 4-7.

The State gave its opening statement and called Community Corrections Officer Ryan Kowalchuck, 03/22/11 RP 10-40, 03/23/11 RP 66-101, Michelle Dequis, 03/23/11 RP 50-66, Deputy William Ruder, 03/23/11 RP 101-31, and Beverly Smith, 03/23/11 RP133-42.

The State then rested. 03/23/11 RP 142.

The defendant moved to dismiss the two counts of second degree identity theft charged in counts I and V, and the two counts of possessing stolen property charged in counts II and III for insufficient evidence. 03/24/11 RP 145-50. The court denied the motion. 03/24/11 RP 150.

The defendant called Courtney Brown, 03/24/11 RP 153-72, and Brianna Davis, 03/24/11 RP 173-96, and rested. 03/24/11 RP 197.

The parties discussed jury instructions. 03/24/11 RP 144-45, 197-200. The defendant had no objection to any of the instructions. 03/24/11 RP 200.

The court read the instructions, 03/24/11 RP 200-01, and the parties gave closing arguments. 03/24/11 RP 201-17 (State's closing argument), 03/24/11 RP 217-36 (Defendant's closing argument), 03/24/11 RP 237-46 (State's rebuttal argument).

The jury returned verdicts of guilty to second degree identity theft as charged in count I, the two counts of second degree possessing stolen

property charged in counts II and III, and second degree identity theft as charged in count V. CP 79, 80-82. 03/25/11 RP 247-49.

On June 3, 2011, the court sentenced the defendant to 51 months in total confinement on counts I and V, and 24 months in total confinement on counts II and III, all confinement to be served concurrently. CP 85-97. It also imposed legal financial obligations totaling $800.00, and 12 months community custody. CP 85-97. *See* 06/03/11 RP 12-13.

The defendant filed a timely notice of appeal on June 30, 2011. CP 98-109.

2. Facts

In February, 2008, Ryan Kowalchuck was a Community Corrections Officer employed by the Washington State Department of Corrections (DOC), and assigned to the Pierce County Drug Offender Sentencing Alternative unit in Tacoma. 03/22/11 RP 10-16. Specifically, Kowalchuck was assigned to conduct "home visits on DOC offenders." 03/22/11 RP 16. Kowalchuck described a home visit as "go[ing] to the home to make sure the individual [in community custody] is living where they say they are living, to do a compliance check to make sure that they are following the conditions of their supervision." 03/22/11 RP 16.

On February 5, 2008, he conducted a home visit of the defendant's Pierce County, Washington, home to assure the defendant's compliance with the terms of his community custody, which included a prohibition

against possession of firearms and ammunition. 03/22/11 RP 16-17, 67. When Kowalchuck arrived at the home in which the defendant was residing, he knocked on the door, and the defendant's girlfriend answered. 03/22/11 RP 18. Kowalchuck identified himself by name and position, and indicated that he wanted to conduct a home visit. 03/22/11 RP 18. The defendant's girlfriend then let him into the residence and took him to the defendant's bedroom. 03/22/11 RP 18.

When Kowalchuck arrived at the bedroom, he introduced himself and asked the defendant to give him a walk-through of the home to insure the defendant's compliance with his conditions of community custody. 03/22/11 RP 19-20. The two went to the family room where Kowalchuck noticed a Remington ammunition box sitting on the coffee table. 03/22/11 RP 20l; 03/23/11 RP 74. The box did not appear to be weathered or old, and seemed new, but was found to be empty. 03/22/11 RP 20-21. When Kowalchuck asked the defendant where the box came from, the defendant said that he found it outside the residence. 03/22/11 RP 23; 03/23/11 RP 75.

Given that the box did not appear to have been weathered, Kowalchuck found the defendant's explanation "somewhat flawed" and was concerned that the defendant may possibly be in violation of his conditions of community custody by being in possession of firearms or ammunition. 03/22/11 RP 21-23; 03/23/11 RP 75.

Kowalchuck then notified his supervisor that he was going to conduct a more thorough search of the residence and returned to the defendant's bedroom. 03/22/11 RP 23-24.

Once there, he saw a glass pipe in plain view on the nightstand. 03/22/11 RP 24. Kowalchuck then looked in drawers to search for a gun or ammunition, and discovered, in a drawer at the foot of Defendant's bed, several credit cards and a valid Washington state driver's license belonging to Michelle Dequis. 03/22/11 RP 24, 35-37. Specifically, he found a "Visa Classic Card," a "Home Depot" card, and a "Household Bank Gold Master Card," issued by HSBC, all in the name of Dequis. 03/22/11 RP 37-38, 03/23/11 RP 57. Kowalchuck also found a bank check drawn on an account of William Dequis, and made out to "Cash & Carry." 03/22/11 RP 38.

The defendant said that the credit cards and driver's license were not his, that he knew they were in his room, but that he felt wrong throwing them away. 03/22/11 RP 35.

Kowalchuck asked a Pierce County Sheriff's deputy to respond, and continued his search of Defendant's room. 03/22/11 RP 37-39. In a tin box, on the other side of the bedroom, Kowalchuck found "a bunch of mailings, documents, a driver's license and some gift cards" in the name of Beverly Smith. 03/22/11 RP 40, 03/23/11 RP 67-68. The mailings

included financial documents and account statements in the name of Beverly Smith. 03/23/11 RP 69-70, 106.

Kowalchuck also found a "Circuit City Rewards" card in the name of Jason Paulson, a Visa gift card with no name, an H&R Block debit MasterCard, a Hallmark card, a gift card for Burlington Coat Factory, a business card, and a Lane Bryant card in the tin. 03/23/11 RP 70. When Pierce County Sheriff's Deputy Ruder arrived, Kowalchuck turned over the items found in the defendant's bedroom to Ruder. 03/23/11 RP 70; 03/23/11 RP 106-06

Michelle Dequis worked at the Spanaway Wal-Mart store. 03/23/11 RP 50-51. Wal-Mart did not have a place for Dequis to store her personal property in the store. 03/23/11 RP 52. So, she kept her purse underneath the passenger seat of her car when she worked. 03/23/11 RP 52.

However, on October 2, 2007, her vehicle's door lock was damaged and her purse was stolen from her vehicle while she worked, along with an I-pod, a child's car seat, and a stroller. 03/23/11 RP 52-55; 03/23/11 RP 129-30.

Dequis called the issuers of her credit cards to cancel them the same day they were stolen, but was told that there were already "multiple charges on both [cards]." 03/22/11 RP 54, 63-64. The cards were used five or six times at a gas station outside of the Wal-Mart where she worked and to purchase air time from Verizon Wireless. 03/22/11 RP 54.

Dequis indicated that the check found by Kowalchuck in the name of William Dequis pertained to a business that she owned with Mr. Dequis, who was her brother-in-law. 03/22/11 RP 58.

Dequis testified that she did not know the defendant and never gave him permission to use any of her credit cards, or to have any of her items, including the credit cards, her driver's license, and the check, in his possession. 03/22/11 RP 59-60, 65.

Beverly Smith testified that on December 15, 2007, her Yelm home was broken into and that jewelry, a checkbook, a driver's license, a "boom box," pillow cases, and "a bunch of papers," including receipts with a portion of her credit card numbers and financial documents were stolen. 03/23/11 RP 133-34, 136. Smith testified that she did not know the defendant and never gave him permission to possess any of her financial documents or her driver's license. 03/23/11 RP 138.

The defendant called Courtney Brown, who had previously been convicted of third-degree theft and obstructing. 03/24/11 RP 153-56. She testified that she was out with her friend, Brianna Davis, who is the defendant's sister. 03/24/11 RP 153-56. She testified that it was a "school night," and that they were hurrying to get home, when they decided to take a bus to a Wal-Mart store to buy tampons. 03/24/11 RP 156-58. Brown testified that she used the restroom in Wal-Mart before buying anything, and while there, found some "cards." 03/24/11 RP 158. She testified that the cards found in the defendant's room "look[ed] familiar." 03/24/11 RP

159. Brown testified that she bought tampons from the store after finding the cards in the store's restroom, but did not tell store staff about the cards she found. 03/24/11 RP 164. Brown indicated that she took the cards from the bathroom and brought them back to the defendant's residence, where she left them on a table. 03/24/11 RP 159-60. She testified that no one mentioned the cards for two years after she left them on the defendant's table. 03/24/11 RP 167-69. Brown did not know how the cards got into the defendant's bedroom. 03/24/11 RP 169.

Brianna Davis testified that she and Brown transferred busses at the Wal-Mart and that Brown needed to use the bathroom at Wal-Mart. 03/24/11 RP 176. Afterwards, Brown bought tampons, and they boarded another bus. 03/24/11 RP 176. Davis testified that Brown then told her that she had found some cards in the store but forgot to turn them in. 03/24/11 RP 176. Although Brown testified that Davis' mother was not awake when the two arrived home, Davis testified that her mother was awake and very angry. 03/24/11 RP 167, 183. Davis testified that the cards got combined with the defendant's mail and were handed to the defendant with the mail. 03/24/11 RP 180. Davis testified that she was there when the defendant was arrested for possession of the cards, but that she said nothing to the officer about what she knew about the cards. 03/24/11 RP 188-93.

Deputy Ruder informed the defendant of the ***Miranda*** warnings, 03/23/11 RP 71, and spoke with him. 03/23/11 RP 117-18. The defendant first denied that the room in which the cards were found was his bedroom. 03/23/11 RP 117-18. Several minutes later, the defendant admitted that it was his bedroom, and in fact that he had been in sole possession of that bedroom for at least two months. 03/23/11 RP 117-18. The defendant also initially denied knowing about the documents, but several minutes later, he admitted that he knew the documents were there. 03/23/11 RP 118. However, the defendant said he did not intend to use them. 03/23/11 RP 118.

C. ARGUMENT.

1. THE COURT PROPERLY ENTERED WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CRIMINAL RULES 3.5 AND 3.6 AND THE DEFENDANT IS NOT PREJUDICED BY THE TIMING OF THEIR ENTRY BECAUSE THEY SIMPLY MEMORIALIZE THE COURT'S ORAL FINDINGS AND CONCLUSIONS.

Both Criminal Rule (CrR) 3.5 and CrR 3.6 require that a court enter written findings of fact and conclusions of law following evidentiary hearings. CrR 3.5(c); CrR 3.6(b). "[T]he primary purpose of requiring findings is to allow the appellate court to fully review the questions raised

on appeal." ***State v. Hillman***, 66 Wn. App. 770, 774, 832 P.2d 1369 (1992)(*citing* ***State v. McGary***, 37 Wn.App. 856, 861, 683 P.2d 1125 (1984)); ***State v. Head***, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

A trial court's failure to enter written findings of fact and conclusions of law requires "[r]emand for entry of written findings and conclusions." ***Head***, 136 Wn.2d at 622-24. Reversal is not a proper remedy unless "a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same." *Id.* at 624.

Moreover, "[i]t is the general rule in this state that findings and conclusions may be submitted and entered while an appeal is pending," if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. ***State v. Hillman***, 66 Wn. App. 770, 773, 832 P.2d 1369 (1992)(*quoting* ***State v. McGary***, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984)); ***State v. Chamberlin***, 161 Wn.2d 30, 43fn8, 162 P.3d 389 (2007). Courts will not infer prejudice from delay in entry of written findings of fact and conclusions of law. ***Head***, 136 Wn.2d at 625. The burden of proving any prejudice is on the defendant. *Id;* ***Chamberlin***, 161 Wn.2d at 43 fn8.

In the present case, the court did enter written findings of fact and conclusions of law pursuant to CrR 3.5(c) and CrR 3.6(b). CP 115-20;

Appendix A-B. Although the court entered these findings while this appeal was pending, there is no appearance of unfairness and the defendant is not prejudiced by their entry.

Indeed, the written findings of fact and conclusions of law simply memorialize the court's oral findings and conclusions, without adding anything of substance. *Compare* 02/17/2011 RP 73-76 (court's oral ruling) *with* CP 115-17 (written findings and conclusions).

Specifically, the court orally found that Kowalchuck went to the defendant's residence to make a routine check on the defendant, 02/17/2011 RP 73-74, and reduced this finding to writing in undisputed finding of fact number 1. CP 115; Appendix A. The court orally found that the defendant's girlfriend met Kowalchuck at the door of the residence, "invited him in and took him back to a bedroom, apparently, where [the defendant] was living, 02/17/2011 RP 73, and reduced this finding to undisputed writing as finding of fact 2. CP 115; Appendix A. The court orally found that Kowalchuck was inside the home when he saw the ammunition box, 02/178/2011 RP 74, and reduced this finding to writing in undisputed finding of fact 3. RP 115-16; Appendix A. The court orally found that the defendant "is prohibited from possession of ammunition," and that Kowalchuck went to defendant's bedroom to search for ammunition, 02/17/2011 RP 74-75, and reduced this finding to

writing in undisputed finding of fact 4. CP 116; Appendix A. The court orally found that, during this search, Kowalchuck found a drug pipe, "Airsoft" pistols, and a knife, 02/17/2011 RP 75, and reduced this finding to writing as undisputed finding of fact 5. CP 116; Appendix A. Finally, the court orally found that during that search, Kowalchuck also found "credit cards belonging to other people [and] bank statements in other people's names," 02/17/2011 RP 75, and reduced this finding to writing as undisputed finding of fact 6. CP 116; Appendix A.

The court orally concluded that the defendant had a duty to abide by conditions of his community custody and that the defendant was prohibited from such activities as possessing ammunition, 02/17/2011 RP 73-76, and reduced this to writing as reason for admissibility 1. CP 116; Appendix A. The court orally concluded that Kowalchuck was legally in the defendant's residence when he discovered the empty ammunition box and that, when the defendant gave an explanation for that box that Kowalchuck found implausible, Kowalchuck had reasonable cause to search for the missing ammunition. 02/17/2011 RP 74-75. The court reduced this oral conclusion to writing as reason for admissibility 2. CP 116-17; Appendix A. The court orally concluded that when Kowalchuck entered the defendant's bedroom to conduct the search, he saw a drug pipe in plain view, and that the defendant's possession of this pipe was a

violation of the terms of his community custody, and illegal in itself. 02/17/2011 RP 75. The court reduced this oral conclusion to writing as reason for admissibility 3. CP 117; Appendix A. The court orally concluded that other items of evidence were also found in the defendant's bedroom as part of a lawful search supported by reasonable cause. 02/17/2011 RP 75-76. The court reduced this oral conclusion to writing as reason for admissibility 4. CP 117; Appendix A. The court orally concluded that the items found in the defendant's bedroom "were subject to seizure," 02/17/2011 RP 75, and reduced this conclusion to writing as reason for admissibility 5. CP 117; Appendix A. Finally, the court orally "den[ied] the motion to suppress," and reduced this to writing as reason for admissibility 6. CP 117; Appendix A.

Thus, the written findings and conclusions were in no way tailored to meet the defendant's arguments on appeal, and the defendant is in no way prejudiced by their entry. In fact, the defendant's arguments retain as much force after their entry as they possessed before.

Because the court entered written findings of fact and conclusions of law pursuant to CrR 3.5(c) and CrR 3.6(b), and the defendant was not prejudiced by the timing of such entry, this Court should accept these findings and conclusions and affirm the court below.

2. THE COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE KOWALCHUCK'S ENTRY INTO AND SUBSEQUENT SEARCH OF DEFENDANT'S RESIDENCE WERE LAWFUL WHERE THE ENTRY WAS BASED ON LAWFUL CONSENT AND THE SEARCH ON REASONABLE CAUSE TO BELIEVE THE DEFENDANT VIOLATED A CONDITION OF COMMUNITY CUSTODY.

"When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." ***State v. Garvin,*** 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (*citing* ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)); ***State v. Winterstein***, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

"Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" *Id.* (*quoting* ***State v. Reid***, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). Credibility determinations are not reviewed on appeal, ***State v. Gibson***, 152 Wn. App. 945, 951, 219 P.3d 964 (2009), and "[u]nchallenged findings of fact are treated as verities on appeal." ***State v. Afana***, 169 Wn.2d 169, 176, 233 P.3d 879 (2010).

Courts "review conclusions of law from an order pertaining to the suppression of evidence de novo," *Id.*, ***State v. Louthan***, 158 Wn. App. 732, 740, 242 P.3d 954 (2010), and "can uphold the trial court on any valid basis." ***Gibson***, 152 Wn. App. at 958.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." Article I, section 7 of the Washington State Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

"[A] warrantless search is per se unreasonable, unless if falls within one of the carefully drawn exceptions to the warrant requirement." ***State v. Patton***, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Similarly, "[t]he 'authority of law' requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions." ***State v. Afana***, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010); ***State v. Winterstein***, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). "Generally, the trial court suppresses evidence seized from an illegal search under the exclusionary rule or the fruit of the poisonous tree doctrine." ***State v. Parris***, 163 Wn. App. 110, 117, 259 P.3d 331 (2011).

"Although in some circumstances article I, section 7 provides broader protections than its federal counterpart, Washington law recognizes that probationers and parolees have a diminished right of privacy which, permits a warrantless search, based on probable cause." ***State v. Parris,*** 163 Wn. App. 110, 117, 259 P.3d 331 (2011). "Parolees and probationers have diminished privacy rights because they are persons whom a court has sentenced to confinement but who are simply serving their time outside the prison walls; therefore, the State may supervise and scrutinize a probationer or parolee closely." *Id.*

Specifically, RCW 9.94A.631 provides, in relevant part, that:

> [i]f there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.631(1).

Hence, "[a] warrantless search of parolee or probationer is reasonable if an officer has well-founded suspicion that a violation has occurred." ***Parris,*** 163 Wn. App. at 119. "Analogous to the requirements of a ***Terry*** stop, [i.e., under ***Terry v.*** Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)] reasonable suspicion requires specific and articulable facts and

rational inferences," and "'[a]rticulable suspicion' is defined as a substantial possibility that criminal conduct has occurred or is about to occur." *Id.*

"Consent" is another "one of the narrow exceptions to the search warrant requirement." ***State v. Khounvichai***, 149 Wn.2d 557, 69 P.3d 862 (2003).

"It is the State's burden to establish that a consent to search was lawfully given," and "[i]n order to meet this burden, three requirements must be met: (1) the consent must be voluntary, (2) the person consenting must have the authority to consent, and (3) the search must not exceed the scope of the consent." ***State v. Thompson***, 151 Wn.2d 793, 92 P.3d 228 (2004).

In ***State v. Ferrier***, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998), our Supreme Court adopted the following rule:

> [W]hen police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home.

(Emphasis added).

However, the Supreme Court has since clarified that ***Ferrier*** "warnings are required only when police officers seek entry to conduct a consensual search for contraband or evidence of a crime." ***State v.***

***Khounvichai***, 149 Wn.2d 557, 563, 566, 69 P.3d 862 (2003); *See* ***State v. Williams***, 142 Wn.2d 17, 28, 11 P.3d 714 (2000); ***State v. Bustamante-Davila***, 138 Wn.2d 964, 981, 983 P.2d 590 (1999); ***State v. Leupp***, 96 Wn. App. 324, 980 P.2d 765 (1999), *review denied*, 139 Wn.2d 1018 (2000).

In ***Khounvichai***, the Court recognized, that "there is a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes." 149 Wn.2d at 564. The Court reasoned that it would not be prudent or necessary to extend ***Ferrier*** to require that police officers warn citizens of the right to refuse consent to search when they request entry into a home merely to question or gain information from an occupant. ***Khounvichai***, 149 Wn.2d at 566. "Such an extension of ***Ferrier*** does not further the constitutional reasons for the warnings and may unnecessarily frustrate police investigations." *Id.*

"To establish valid consent, the State must [also] show that the person consenting to the search had authority to consent." ***State v. White***, 141 Wn. App. 128, 135-36, 168 P.3d 459 (2007)(*citing* ***State v. Thompson***, 151 Wn.2d 793, 803, 92 P.3d 228 (2004)).

"A third party may consent to a search if he or she possesses 'common authority over or other sufficient relationship to the premises or effects sought to be inspected.' " ***White***, 141 Wn. App. at 136 (*quoting* ***State v. Holmes***, 108 Wn. App. 511, 518, 31 P.3d 716 (2001)(*quoting* ***United States v. Matlock***, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L.Ed.2d

242 (1974))). Common authority exists when there is "'mutual use of the property by persons generally having joint access or control for most purposes.' " *Id.* (*quoting* ***Matlock***, 415 U.S. at 171 n. 7, 94 S.Ct. 988). "Access and permission to enter are the hallmarks of common authority." *Id.* at 136 (*quoting* ***Holmes***, 108 Wash.App. at 520).

In the present case, Kowalchuck's initial entry into the residence, marked by the period of time from which he "was let into the residence by the defendant's girlfriend" to the time at which he met with the defendant, CP 115 (findings of fact 1-2), was a lawful entry to contact the defendant founded upon the consent of the defendant's girlfriend.

Here, the State established that: (1) the consent was voluntary, (2) the person consenting must have the authority to consent, and (3) the entry did not exceed the scope of the consent. *See* ***State v. Thompson***, 151 Wn.2d 793, 92 P.3d 228 (2004).

"Whether consent was voluntary or instead the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." ***State v. O'Neill***, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). Here, Kowalchuck testified that he knocked on the door of defendant's residence, was greeted by the defendant's girlfriend, and was "sure" that he explained to her that he was a community corrections officer and wanted to come in to conduct a home visit with the defendant, who was under community custody. 02/17/2011 RP 22, 26-27; CP 115 (undisputed finding of fact 1). In its undisputed finding of fact 2,

the court found that the defendant's girlfriend then let Kowalchuck into the residence and "led [him] him back to the defendant's bedroom where he contacted the defendant." CP 115. Thus, the State established that consent was voluntary and that there is nothing to indicate that it was the product of duress or coercion.

Although the defendant argues that the State failed to show that "either [the defendant's] girlfriend or [the defendant] were ever told that they had the right to refuse Kowalchuck's entry into and search of the home," Brief of Appellant, p. 13-16, the State was not required to make such a showing. Indeed, such ***Ferrier*** "warnings are required only when police officers seek entry to conduct a consensual search for contraband or evidence of a crime." ***State v. Khounvichai***, 149 Wn.2d 557, 563, 566, 69 P.3d 862 (2003). Kowalchuck was not seeking entry to conduct a search for contraband or evidence of a crime. 02/17/2011 RP 39-40. Rather; he was seeking entry to conduct "a routine home visit," to make sure that the defendant was actually residing at the address he listed with DOC. 02/17/2011 RP 39-40. Given that one of the conditions of Defendant's community custody was that his "residence location and living arrangements [were] subject to the prior approval of DOC," CP 11-21, Kowalchuck had a legitimate investigatory purpose. Because Kowalchuck was not "requesting consent to search a home," but simply to "enter a home for other legitimate investigatory purposes," he was not required to give either the defendant or his girlfriend ***Ferrier*** warnings. Thus, his

failure to do so does not compromise the voluntary consent to enter the residence granted by the defendant's girlfriend.

Second, the State established that the person consenting had the authority to consent. Here, the person consenting was the defendant's girlfriend, a third party.

As noted above, a third party may consent to a search if he or she possesses common authority over the premises. ***White***, 141 Wn. App. at 136. Common authority exists when there is "'mutual use of the property by persons generally having joint access or control for most purposes.' " ***White***, 141 Wn. App. at 136.

In this case, the uncontested testimony was that the defendant's girlfriend was, along with the defendant, one of the residents of the house in question. 02/17/2011 RP 49. Therefore, she had joint access and control of the property, and hence, common authority over the premises. *See* ***White***, 141 Wn. App. at 136. Because the defendant's girlfriend possessed common authority over the premises, she had authority to consent to Kowalchuck's entry into the residence. ***White***, 141 Wn. App. at 136.

Therefore, the State also established that the person consenting had the authority to consent

Finally, the State established that the entry did not exceed the scope of the consent. Kowalchuck told the defendant's girlfriend that he was a community corrections officer and wanted to come in to conduct a

home visit with the defendant, 02/17/2011 RP 22, 26-27; CP 115 (undisputed finding of fact 1), the purpose of which he explained as, at least in part, making sure that the defendant was actually residing at the address he listed with DOC. 02/17/2011 RP 39-40. In its undisputed finding of fact 2, the court found that the defendant's girlfriend then let Kowalchuck into the residence and "led [him] him back to the defendant's bedroom where he contacted the defendant." CP 115. Hence, Kowalchuck went directly from the front door of the residence to contacting the defendant in his bedroom, and did not exceed the scope of the consent granted by the defendant's girlfriend.

Hence, the State established that consent to enter the residence to contact the defendant was lawfully given, *see* ***Thompson***, 151 Wn.2d 793, and, in so doing, showed that Kowalchuck's entry into the home was lawful under "one of the narrow exceptions to the search warrant requirement." ***Khounvichai***, 149 Wn.2d 557.

Kowalchuck's subsequent search of the defendant's bedroom was a lawful warrantless search supported by reasonable cause to believe that the defendant had violated a condition or requirement of his sentence. *See* RCW 9.94A.631(1).

Indeed, once Kowalchuck lawfully entered the residence and contacted the defendant, he and the defendant went to the family room of the residence, where Kowalchuck "saw a[n empty] box of ammunition

sitting on the table in the family room." 02/17/2011 RP 28-29. Although the defendant claimed that he found the ammunition box outside in the middle of February, the box did not appear to be weathered. 02/17/2011 RP 45-46. Because the conditions of the defendant's community custody prohibited possession of ammunition, 02/17/2011 RP 29, CP 11-21, Kowalchuck became concerned that the defendant may have firearms or ammunition in the house. 02/17/2011 RP 29.

In other words, he had formed a "reasonable suspicion" based on "specific and articulable facts and rational inferences," ***Parris,*** 163 Wn. App. at 119, that the defendant had violated his community custody conditions. Thus, Kowalchuck had reasonable cause to believe that the defendant had violated a condition or requirement of the sentence," and based on that, authority to require the defendant to submit to a warrantless search of his residence. RCW 9.94A.631(1); ***Parris,*** 163 Wn. App. at 117.

Therefore, Kowalchuck's subsequent search of the defendant's bedroom through which he found a glass pipe, a small baggie with white crystalline residue, and the documents, driver's licenses, and credit cards belonging to Michelle Dequis and Beverly Smith, 02/17/2011 RP 29-32, was, under RCW 9.94A.631(1), a lawful warrantless search supported by reasonable cause to believe the defendant had violated his community custody conditions. *See, e.g.,* ***Parris,*** 163 Wn. App. at 117.

Hence, the court properly denied defendant's motion to suppress evidence because Kowalchuck's entry into the residence was a lawful warrantless entry supported by consent, and his subsequent search of the residence was a lawful warrantless search supported by reasonable cause to believe the defendant had violated his community custody conditions. Therefore, the court's ruling and the defendant's convictions should be affirmed.

3. DEFENDANT'S CONVICTIONS OF SECOND DEGREE IDENTITY THEFT AND SECOND DEGREE POSSESSING STOLEN PROPERTY SHOULD BE AFFIRMED BECAUSE, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE IS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THE DISPUTED ELEMENTS.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. ***State v. Lopez***, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, P.3d 59 (2006) (*quoting* ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient

evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (*quoting* ***State v. Myers***, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Determinations of credibility are for the fact finder and are not reviewable on appeal." ***Brockob***, 159 Wn.2d at 336.

In the present case, in its instruction 7, the trial court instructed the jury that:

> To convict the defendant of ***identity theft in the second degree***, as charged in Count I, the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about February 5, 2008, the defendant knowingly obtained, possessed, or transferred or used a means of identification or financial information of another person, living or dead, to wit: Michelle Dequis;
>
> ***(2) That the defendant acted with the intent to commit or aid or abet any crime;***
>
> (3) That the defendant obtained credit, money, goods, services or anything else that is $1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services or other items of value; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CP 52-78 (instruction no. 7)(emphasis added). *See* Appendix C; RCW 9.35.020.

The court's instruction number 8, which pertained to the second degree identity theft charged in count V, was identical, except that it listed "Count V" instead of "Count I," and substituted "Beverly Smith" for "Michelle Dequis" as the name of the victim. CP 52-78 (instruction no. 8). *See* Appendix C.

With respect to the possessing stolen property counts, the trial court, in its instruction 14, instructed the jury that:

To convict the defendant of the crime of ***possessing stolen property in the second degree***, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5th say of February, 2008, the defendant knowingly possessed stolen property;

***(2) That the defendant acted with knowledge that the property had been stolen;***

(3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;

(4) That the stolen property was an access device, to wit: debit/credit card number ending in 7364; and

> (5) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 52-78 (emphasis added). *See* Appendix C. Instruction 15 was identical, except it substituted "Count III" for "Count II", and the last four digits of the credit card number at issue. CP 52-78. *See* Appendix C.

The defendant did not object to these instructions, 03/24/11 RP 200, and therefore, they became the law of the case. *See* ***State v. Hickman***, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

Here, the defendant argues that the evidence of element (2) with respect to both counts of identity theft and both counts of possessing stolen property was insufficient. Brief of Appellant, p. 16-19. The record demonstrates otherwise.

"[A]lthough possession alone is not sufficient to prove guilty knowledge, possession together with slight corroborating evidence of knowledge may be sufficient." ***State v. Scoby***, 117 Wn.2d 55, 61-62, 810 P.2d 1358 (1991). "[S]pecific criminal intent of the accused may be inferred from [the defendant's] conduct where it is plainly indicated as a

matter of logical probability." ***State v. Delmarter***, 94 Wn. 2d 634, 638, 618 P.2d 99 (1980). Thus, a false explanation, or one that is improbable or difficult to verify can be sufficient corroboration to prove guilty knowledge. *See* ***State v. Ladely***, 82 Wn.2d 172, 175, 509 P.2d 658 (1973)(addressing knowledge in the context of possessing stolen property).

In the present case, there are at least two pieces of corroborating evidence which render the total evidence of element (2) sufficient with respect to all counts.

First, there was evidence that both of the stolen credit cards in Defendant's possession, *see* 03/22/11 RP 37-38, 03/23/11 RP 57, had been unlawfully used for unauthorized purchases. 03/22/11 RP 54, 63-64. Specifically, Dequis, the woman to whom the cards were issued, testified that she contacted the card issuers after the cards were stolen, and was told that there were already "multiple charges on both [cards]." 03/22/11 RP 54, 63-64. The cards were used unlawfully five or six times at a gas station outside of the Wal-Mart where she worked, and to purchase air time from Verizon Wireless. 03/22/11 RP 54. While the defendant is correct that there was no direct evidence that he was the one who stole the cards, it is reasonable to infer from the fact that the cards were used unlawfully after they were stolen, and the fact that they were found in the

defendant's possession after they were stolen, that it was the defendant who used them unlawfully. Because "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant," ***Salinas***, 119 Wn.2d at 201, this inference must be drawn. When it is, a rational fact finder could find beyond a reasonable doubt that the defendant acted with the intent to commit a crime when he possessed the credit cards containing the financial information of Michelle Dequis. Given this, there is sufficient evidence of element (2) of the identity theft count pertaining to Dequis. *See* CP 52-78 (instruction no. 7); ***State v. Cannon***, 120 Wn. App. at 90.

Further, because the defendant also possessed financial documents in the name of Beverly Smith, and another card in the name of Jason Paulson, it would be reasonable to infer from the fact that some of the cards in his possession had already been unlawfully used that he intended to use the remaining information for an unlawful purpose. Because "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant," ***Salinas***, 119 Wn.2d at 201, this inference must be drawn. When it is, a rational fact finder could find beyond a reasonable doubt that the defendant acted with the intent to commit a crime when he possessed the financial information

of Beverly Smith. Hence, there is sufficient evidence of element (2) of the identity theft count pertaining to Smith, as well.

Finally, if it is inferred, as it must be for purposes of this analysis, that the defendant was the one who unlawfully used the stolen credit cards which are the subject of the possessing stolen property counts, then it can reasonably be inferred that the defendant acted with knowledge that these cards had been stolen. *See* CP 52-78 (instructions 14, 15). After all, Dequis neither knew the defendant nor gave him permission to use her cards. 03/22/11 RP 59-60, 65. Because "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant," ***Salinas***, 119 Wn.2d at 201, this inference must also be drawn. When it is, a rational fact finder could find beyond a reasonable doubt that the defendant acted with knowledge that the cards at issue in counts II and III had been stolen. Therefore, there was sufficient evidence of element (2) with respect to the possessing stolen property counts, as well.

The second piece of corroborating evidence is comprised of the defendant's inconsistent statements, which are evidence of his consciousness of guilt, and hence, of the intent and knowledge elements at issue here. Specifically, in his post-***Miranda*** conversation with Deputy Ruder, the defendant initially denied that the room in which the cards were

found was his bedroom. 03/23/11 RP 117-18. Several minutes later, the defendant admitted that it was his bedroom, and in fact, that he had been in sole possession of that bedroom for at least two months. 03/23/11 RP 117-18. The defendant also initially denied knowing about the documents at issue, but several minutes later, admitted that he knew the documents were there. 03/23/11 RP 118. It is reasonable to infer from the fact that the defendant initially denied that he knew of the documents, that he (1) knew they were stolen, and (2) intended to use them to commit or aid the commission of a crime. Because "all reasonable inferences from the evidence must be drawn in favor of the State," ***Salinas***, 119 Wn.2d at 201, these inferences must be drawn. When they are, a rational fact finder could find beyond a reasonable doubt that the defendant (1) acted with knowledge that the property had been stolen, and (2) acted with the intent to commit or aid or abet any crime. Therefore, there was sufficient evidence of element (2) with respect to both the identity theft and possessing stolen property counts.

Because there was sufficient evidence, the defendants convictions should be affirmed.

D. CONCLUSION.

The court properly entered written findings of fact and conclusions of law pursuant to Criminal Rules 3.5 and 3.6. Moreover, the defendant is not prejudiced by the timing of their entry because such findings and conclusions simply memorialize the court's oral findings and conclusions.

The court properly denied Defendant's motion to suppress because Kowalchuck's entry into and subsequent search of Defendant's residence were lawful, where the entry was based on lawful consent and the search on reasonable cause to believe the defendant had violated a condition of community custody.

The defendant's convictions of second degree identity theft should be affirmed because, when viewed in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the element of acting with the intent to commit or aid or abet any crime beyond a reasonable doubt.

Finally, the defendant's convictions of second degree possessing stolen property should be affirmed because, when viewed in the light most favorable to the State, there is sufficient evidence from which a rational

trier of fact could have found the element of acting with knowledge that the credits cards at issue were stolen beyond a reasonable doubt.

Therefore, the defendant's convictions should be affirmed.

DATED: February 24, 2012.

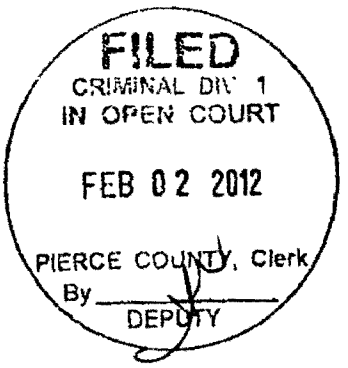
MARK LINDQUIST
Pierce County
Prosecuting Attorney

Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the ~~appellant and appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2.24.12 Therese Kai
Date Signature

# APPENDIX A


SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

| | |
|---|---|
| STATE OF WASHINGTON,<br>Plaintiff,<br>vs.<br>MARIO ELLIOTT FALSETTA,<br>Defendant. | CAUSE NO. 09-1-00170-9<br>FINDINGS AND CONCLUSIONS ON ADMISSIBILITY OF EVIDENCE CrR 3.6 |

THIS MATTER having come on before the Honorable Judge Ronald Culpepper on the 17th day of February, 2011, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

THE UNDISPUTED FACTS

1. On February 5, 2008, Community Corrections Officer (CCO) Ryan Kowalchuk went to the defendant's residence in Pierce County to conduct a compliance check. The defendant was on supervision by the Department of Corrections for a DOSA sentence (Drug Offender Sentencing Alternative).
2. CCO Kowalchuk was let into the residence by the defendant's girlfriend. Kowalchuk was led back to the defendant's bedroom where he contacted the defendant.
3. In a common area of the house Officer Kowalchuk found an empty box of ammunition. The defendant volunteered an explanation for the box that Kowalchuk did not believe.



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4. The defendant is prohibited from possessing ammunition by the terms of his probation. Kowalchuk decided to search the defendant's bedroom to see if ammunition or firearms were present.

5. During the search of the defendant's bedroom, Kowalchuk immediately discovered a drug pipe in plain view on top of a nightstand/dresser. The search also revealed several 'airsoft' pistols and a 12 inch knife. The drug pipe and the knife were violations of the defendant's conditions of probation.

6. In a further search of the defendant's bedroom, Kowalchuk found credit cards belonging to other people and bank statements in other people's names.

## THE DISPUTED FACTS

There are no disputed facts.

## FINDINGS AS TO DISPUTED FACTS

Not applicable.

## REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

1. The defendant is a convicted felon under the supervision of the Department of Corrections. As such, he has diminished privacy rights and must abide by the conditions of his supervision.

2. CCO Kowalchuk was legitimately at the defendant's residence conducting a compliance check when he discovered an empty box of ammunition. When the defendant volunteered an implausible explanation for the presence of the ammunition



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box – Kowalchuk had reasonable suspicion to believe that the defendant was in violation of his conditions of supervision.

3. As Kowalchuk entered the defendant's bedroom to search for ammunition and firearms – he observed a drug pipe in plain view which was a violation of the law as well as a violation of his probation.
4. Other items of contraband were found in the defendant's bedroom during a lawful search.
5. All evidence found in the defendant's bedroom was seized legally.
6. The defendant's motion to suppress the evidence is denied.

DONE IN OPEN COURT this 2nd day of February, 2012.

JUDGE

RONALD E. CULPEPPER

FILED
CRIMINAL DIV. 1
IN OPEN COURT
FEB 02 2012
PIERCE COUNTY, Clerk
By _____ DEPUTY

Presented by:

SVEN NELSON
Deputy Prosecuting Attorney
WSB # 24235

Approved as to Form:

KIRK T. MOSLEY
Attorney for Defendant
WSB # 29683

skn



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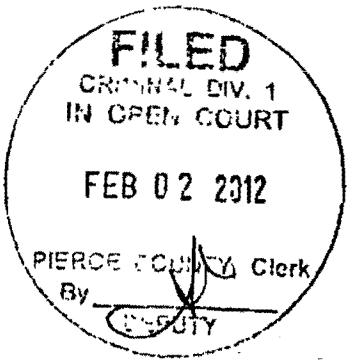
# APPENDIX B


SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

| | |
|---|---|
| STATE OF WASHINGTON,<br>Plaintiff,<br>Vs.<br>MARIO ELLIOTT FALSETTA,<br>Defendant. | CAUSE NO. 09-1-00170-9<br>FINDINGS OF FACT AND CONCLUSIONS OF LAW<br>ADMISSIBILITY OF STATEMENT, CrR 3.5 |

THIS MATTER having come on for hearing before the Honorable Judge Ronald Culpepper on the 17th day of February, 2011, and the court having ruled orally on the admissibility of the defendant's statements, now, therefore, the court sets forth the following Findings of Fact and Conclusions of Law as to admissibility.

UNDISPUTED FACTS

1 On February 5, 2008, Department of Corrections (DOC) Community Corrections Officer (CCO) Ryan Kowalchuk went to the defendant's residence in the Graham area of Pierce County to conduct a compliance check. The defendant was on DOC supervision while serving a Drug Offender Sentencing Alternative (DOSA) sentence.

2 DOC Officer Kowalchuk was let into the residence by the defendant's girlfriend. Officer Kowalchuk was led into the defendant's bedroom and contacted the defendant. In a common



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area of the house Officer Kowalchuk found an empty box of ammunition. The defendant volunteered an explanation for how the box got there. After hearing the defendant's unlikely explanation, Officer Kowalchuk decided to search the defendant's bedroom. Kowalchuk immediately discovered a drug pipe in plain view on top of a nightstand/dresser. The search also revealed several 'airsoft' pistols and a 12 inch knife. The drug pipe and the knife were violations of the defendant's conditions of probation.

3. After discovering the contraband, the defendant was arrested by CCO Kowalchuk and Pierce County Deputy Ruder was dispatched to the scene

4. The defendant did not ask for an attorney and any statements made to law enforcement personnel were made voluntarily and without coercion. No threats or promises were made to the defendant.

DISPUTED FACTS

The exact timing of the Miranda rights was unclear from the testimony of CCO Kowalchuk and Deputy Ruder Deputy Ruder testified that his normal practice was to advise suspects of their Miranda Rights if he was not present when the rights were given and he is going to interview someone in custody. CCO Kowalchuk testified that he could not remember if he read the Miranda rights to the defendant when he was arrested. Kowalchuk did refer to his report to refresh his recollection and indicated that he was present when Deputy Ruder advised him of his Miranda rights.

That he could not remember if he gave Miranda warnings to the defendant but

CONCLUSIONS AS TO DISPUTED FACTS

The court finds that Deputy Ruder advised the defendant of his Miranda rights from a card issued by the Pierce County Sheriff's Department.



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CONCLUSIONS AS TO ADMISSIBILITY

1 The defendant was in custody after being arrested by CCO Kowalchuk. Spontaneous statements made to CCO Kowalchuk are admissible in the trial However, any post custody pre-miranda statements of the defendant in response to interrogation by Kowalchuk are inadmissible at trial

2. The Miranda warnings given were legally sufficient to advise the defendant of his Constitutional rights. Because the rest of the defendant's custodial statements to law enforcement were made after a knowing, voluntary and intelligent waiver of his constitutional rights, they are admissible in the State's case-in-chief.

DONE IN OPEN COURT this 2nd day of February, 2012

RONALD CULPEPPER, JUDGE

Presented by:

SVEN K. NELSON
Deputy Prosecuting Attorney
WSB# 24235

Approved as to Form:

KIRK T. MOSLEY
Attorney for Defendant
WSB# 29683

FILED
CRIMINAL DIV. 1
IN OPEN COURT
FEB 02 2012
PIERCE COUNTY, Clerk
By _____ DEPUTY

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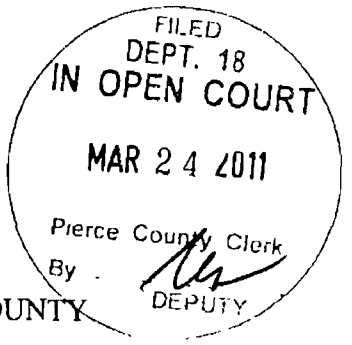
# APPENDIX C


SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

| | |
|---|---|
| STATE OF WASHINGTON,<br>Plaintiff,<br>vs.<br>MARIO E. FALSETTA<br>Defendant. | CAUSE NO. 09-1-00170-9 |

***COURT'S INSTRUCTIONS TO THE JURY***

DATED this 24th day of March, 2011.

Beverly K Grant
JUDGE

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the judicial assistant and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 6

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 6

A person commits the crime of identity theft in the second degree when, with intent to commit or aid or abet any crime, he or she knowingly obtains, possesses, uses, or transfers a means of identification or financial information of another person, living or dead, and obtains credit, money, goods, services or anything else that is $1500 or less in value or does not obtain anything of value.

INSTRUCTION NO. 7

To convict the defendant of identity theft in the second degree, as charged in Count I, the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 5, 2008, the defendant knowingly obtained, possessed, or transferred or used a means of identification or financial information of another person, living or dead, to-wit: Michelle Dequis;

(2) That the defendant acted with the intent to commit or aid or abet any crime;

(3) That the defendant obtained credit, money, goods, services or anything else that is $1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services or other items of value; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

To convict the defendant of identity theft in the second degree, as charged in Count V, the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 5, 2008, the defendant knowingly obtained, possessed, or transferred or used a means of identification or financial information of another person, living or dead, to-wit: Beverly Smith;

(2) That the defendant acted with the intent to commit or aid or abet any crime;

(3) That the defendant obtained credit, money, goods, services or anything else that is $1500 or less in value from the acts described in element (1) or did not obtain any credit, money, goods, services or other items of value; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

"Financial information" means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:

(a) account numbers and balances;

(b) transactional information concerning an account; and

(c) codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers, state identicard numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

INSTRUCTION NO. 10

"Means of identification" means information or an item that is not describing finances or credit, but is personal to or identifiable with an individual or other person, including:

a current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member or his or her family, including the ancestor of the person;

information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family;

a social security, driver's license, or tax identification number of the individual or a member of his or her family; and

other information that could be used to identify the person, including unique biometric data.

INSTRUCTION NO. 11

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 12

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 13

A person commits the crime of possessing stolen property in the second degree when he or she knowingly possesses a stolen access device

Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

INSTRUCTION NO. 14

To convict the defendant of the crime of possessing stolen property in the second degree, as charged in Count II, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5th day of February, 2008, the defendant knowingly possessed stolen property;

(2) That the defendant acted with knowledge that the property had been stolen;

(3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;

(4) That the stolen property was an access device, to-wit: debit/credit card number ending in 7364; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

To convict the defendant of the crime of possessing stolen property in the second degree, as charged in Count III, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5th day of February, 2008, the defendant knowingly possessed stolen property;

(2) That the defendant acted with knowledge that the property had been stolen;

(3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;

(4) That the stolen property was an access device, to-wit: a credit/debit card number ending in 6282; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

Access device means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instruments.

The phrase "can be used" refers to the status of the access device when it was last in possession of its lawful owner, regardless of its status at a later time.

INSTRUCTION NO. 17

Stolen means obtained by theft.

INSTRUCTION NO. 18

Receive includes, but is not limited to, acquiring title, possession, control, or a security interest, or any other interest in property.

INSTRUCTION NO. 19

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services or by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services or to appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive that person of such property or services.

## Instruction No 20

You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of the witness, and for no other purpose.

## Instruction No. 21

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the fact that Mr Falsetta was on active probation and may only be considered by you for the purpose of the reason for the contact by CCO Kowalchuk You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this instruction

INSTRUCTION NO. 13

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 23

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and four verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

# PIERCE COUNTY PROSECUTOR

# February 24, 2012 - 12:14 PM

**Transmittal Letter**

Document Uploaded: 423308-Respondent's Brief.pdf

Case Name: St. v. Falsetta

Court of Appeals Case Number: 42330-8

**Is this a Personal Restraint Petition?** ○ Yes ◉ No

**The document being Filed is:**

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Other: _____

Sender Name: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:

SCCAttorney@yahoo.com